Supreme Court, U.S.
FILED

991826 MAY 16 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JEANETTE E. OYE,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY A. DUFF, Ne:#11094
8214 Hillside
Omaha, NE 68114-1540
(402) 397-5606
(402) 397-3516
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTIONS PRESENTED FOR REVIEW

1. WAIVER: Whether Railroad Retirement Board absolute refusal to apply its unanimously adopted policy, January, 1982, of applying waiver to overpayments made to Mrs. Oye caused by its own administrative error, that Mrs. Oye annuitant could not be expected to be aware of, and which had gone undetected for four (4) and five (5) months deprived Mrs. Oye of her due process of law under the United States Constitution, Amendment V and equity and good conscience under 45 U.S.C. 231i(c).

2. FRAUD: Whether Mr. Rivera's concealment of Mrs. Oye's direct deposit bank records and concealment of Mrs. Oye's RRB W-2 Tax Statements in his file which differed greatly from the RRB, August 26, 1994 accounting records knowingly misrepresented recklessly without belief its truth to the RRB Board deprived Mrs. Oye of her due process rights under the United States Constitution, Amendment V.

3. PRERECOUPMENT HEARING: Whether the Railroad Retirement Board failure to grant Mrs. Oye the opportunity for an oral hearing before recoupment of her social security benefits began deprived Mrs. Oye of her due process rights under the United States Constitution, Amendment V.

4. ACCOUNTING; EXCESS RECOUPMENT – UNJUST ENRICHMENT: Whether the Railroad Retirement Board's current recoupment of $9847.68 and continuing at the rate of $90.00 for the next 14 months from Mrs. Oye, $3650.80 more than was declared by Rivera, Board's hearing officer, has deprived Mrs. Oye of her property without due process of law and deprived Mrs. Oye of her private property taken for public use.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. Railroad Retirement Board refused to apply its unanimously adopted policy, January, 1982, of applying waiver to overpayments caused by administrative error that the annuitant could not be expected to be aware of, and which had gone undetected for four years or longer 5

II. Railroad Retirement Board knowingly concealed bank records and RRB Tax statements which differed from its own accounting records misrepresenting the truth 8

III. Railroad Retirement Board failed to grant an oral recoupment hearing of her social security benefits 12

IV. RRB has recouped $9847.68 for what the RRB says is a $6196.99 overpayment debt 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Ocean S.S. Co. of Savannah, 123 F.2d 469 (1941) 9

Califano v. Yamasaki, 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 12

Groseclose v. Bowen, 809 F.2d 502 (1987) 6, 7

Quinlivan v. Sullivan, 916 F.2d 524 (1990) 6

Peterson v. U.S. R.R. Retirement Bd., 780 F.2d 1361 (1985) 5

Reed v. Railroad Retirement Bd., 107 F.3d 923 (1997) 7

State of California v. Anglim, 129 F.2d 455, cert. denied, 63 S.Ct. 74, 317 U.S. 669, 87 L.Ed. 537 (1942) 9

Utah Cooper Co. v. Railroad Retirement Board, 41 F.Supp. 763; affirmed 129 F.2d 358, cert. denied, 63 S.Ct. 258, 317 U.S. 687, 87 L.Ed. 551 (1942) 4

OTHER AUTHORITIES

U.S. Constitution Amendment V 1, 8, 12, 13

26 U.S.C. Sec. 3201 et seq. 2, 9

28 U.S.C. Sec. 1254(1) 1

RAILROAD RETIREMENT ACT – 1974: 45 U.S.C. Sec. 231 et seq. 2, 5, 8, 9

REGULATIONS: 20 C.F.R. Sec. 255.12 7

RRB SPOUSE ANNUITY BOOK 11

Black's Law Dictionary, Seventh (7th) Edition, West Group, St. Paul, Minn. 1999 9

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Petitioner seeks a writ of certiorari from the judgment and opinion of the U.S. Court of Appeals for the Eighth Circuit.

STATEMENT OF JURISDICTION

(i) The opinion in question was filed on January 13, 2000. A rehearing was sought by the Petitioner and denied on February 17, 2000. (App. 1-3)

(ii) The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

United States Constitution, Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

TAX PROVISIONS

26 U.S.C. Secs. 3201 et seq.

SUBCHAPTER IV – RAILROAD RETIREMENT ACT OF 1974

45 U.S.C. Secs. 231 et seq.

STATEMENT OF THE CASE

The Railroad Retirement Board (RRB), January, 1982 through October, 1996 unanimously adopted a policy of applying waiver to overpayments caused by administrative error that an annuitant could not be expected to be aware of an undetected four (4) years or longer. (App. 11)

Raymond Oye started receiving railroad retirement benefits on March 1, 1986. His wife, Jeanette E. Oye, age 60 on January 11, 1990, became eligible to receive RRB spouse benefits on February 11, 1990.

Mr. Oye, on March 13, 1990, stopped at the Omaha, NE RRB Office, Omaha, NE for a tax form. Mr. Wilwerding, RRB employee, asked Mr. Oye if his wife would like to receive $300.00 or $400.00. Wilwerding asked Oye how much Mrs. Oye would earn in 1990. Oye guessed $26,000.00. Wilwerding then gave Oye a receipt. (App. 4)

On, April 7, 1990, Mrs. Oye filed to have the U.S. Treasury send her payments by direct deposit to her bank account. (App. 5)

From 1990 through 1993 the U.S. Treasury direct deposited to her bank account $27,505.02. For the same years RRB W-2 Tax Statements (App. 6-9) showed

$28,112.84 deposited. Even with $607.82 less in direct deposits than RRB W-2 Tax Statement, Mrs. Oye filed and paid her federal and state taxes based on RRB W-2 Tax statements, paying taxes on monies that had never left the U.S. Treasury.

After the application date, March 13, 1990, four (4) years and five (5) months passed. On August 26, 1994, Mrs. Oye received a RRB letter alleging that: (1) she had received $28,809.75 in RRB benefits not $28,112.84 shown on RRB Tax Statements; (2) she was at fault and overpaid $5062.00.

Two months later, October 1, 1994 the RRB without any oral hearing began recouping $142.00 per month.

Ten months later, March 25, 1995, Mrs. Oye received a RRB letter that the correct overpayment amount was $5316.00.

On January 1, 1996 Mrs. Oye began receiving social security benefits. (App. 15) From January, 1996 through April, 1996 RRB, without a hearing, withheld $811.44.

The social security administration, February 6, 1996, awarded Mrs. Oye $4930.

On April 16, 1996, Mr. Rivera, RRB hearings officer, declared for the record that the current overpayment balance less deductions was $2800.00.

Six days later, April 22, 1996 RRB sent Mrs. Oye by direct deposit $2822.00 of the $4930.00 social security awarded funds.

From October 1, 1994 through April 22, 1996 the RRB had withheld from Mrs. Oye's direct deposits in $2919.44

social security payments plus $3100.56 RRB payments or $6020.00.

The following month, May 21, 1996, Mrs. Oye was involved in a severe automobile accident. The airbag crushed her left hand, ending her nursing career.

On August 22, 1996, Rivera, after reviewing the issues, declared that the overpayment was $6196.88. (App. 14)

On March 25, 1997 the Railroad Retirement Board voted 2-1, with Mr. V.M. Speakman, Jr. dissenting, (App. 11-13) to approve Rivera's calculations. (App. 14) On April 14, 1997 Mrs. Oye received a letter, that RRB was withholding $90.00 for the next 48 months.

To date the RRB has withheld $9847.68 which is $3650.80 more than Rivera's total overpayment calculations. (App. 14)

REASONS FOR GRANTING THE WRIT

BACKGROUND

This is a case of first impression before this Court.

The Railroad Retirement Act of 1974 was created because of the peculiar character and specialized provisions of the Railroad Retirement Act. *Utah Copper Co. v. Railroad Retirement Board,* 41 F.Supp 763, Affirmed 129 F.2d 358, cert. denied, 63 S.Ct. 258, 317 U.S. 687, 87 L.Ed. 551 (1942).

I.

Congress, 45 U.S. Sec. 231f(b)(5), gave the RRB the power to

> " . . . establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of this subchapter. . . . "

In *Peterson v. United States R.B. Retirement BD,* 780 F.2d 1361 (1985) at p. 1363 the Court of Appeals stated:

> "The Railroad Retirement Act authorizes the Board to recover overpaid benefits. 45 U.S.C. Sec. 231i(a). However, the Act further provides that "[t]here shall be no recovery" of over-payments made "to an individual . . . who, in the judgment of the Board, is without fault, when in the judgment of the Board, recovery would be contrary to the purpose of this subchapter . . . or would be against equity or good conscience" 45 U.S.C. Sec. 231i(c). "Thus, there is a two-part test for waiver of overpayment: (1) the beneficiary must be without fault, and (2) recovery must either be (a) against the purpose of the Act or (b) against the equity or good conscience. This test is identical to that established for recovery of overpayment in the Social Security program." 42 U.S.C. Sec. 404(b).

On appeal, Mrs. Oye contests Mr. Bower's and Mr. Kever's refusal to grant her a waiver under its own January, 1982 waiver policy. The test is whether the majority Board's failure to follow its own waiver policy is " . . . supported by substantial evidence, is not arbitrary, and has a reasonable basis in law." *Peterson id.* at p. 1364.

With respect to the specific issue, the question for the court is whether the agency's interpretation of its own January, 1982 Board policy is based on reasonable statute construction.

Quinlivan v. Sullivan, 916 F.2d 524 (1990), p. 527 stated:

> "Congress intended a broad concept of fairness to apply to waiver requests, one that reflects the ordinary meaning of the statutory language and takes into account the facts and circumstances of each case."

The RRB, Mr. Bower, Mr. Kever, and Mr. Speakman all agree (3-0) that Mrs. Oye was without fault in causing or accepting the overpayment. The majority Board failed to provide evidence or address the issue that any recovery would be contrary to the purpose of the sub-chapter and Railroad Employment Insurance Act.

The issue is whether it would be against "equity" or against "good conscience" for Mr. Bower and Mr. Kever to refuse to follow the RRB Board rules, January, 1982, to grant Mrs. Oye a waiver of overpayment.

In *Groseclose v. Bowen*, 809 F.2d 502 (1987), the Court said:

> " . . . The term equity "denotes the spirit and habit of fairness and justness. . . . The term conscience means "the sense of right or wrong * * * together with a feeling of obligation to do or be that which is recognized as good." . . . that "against equity and good conscience is language of unusual generality. . . . that the trier of fact, instead of attempting to channelize his decision with rigid and specific rules, will draw upon

precepts of justice and morality as the basis for his ruling." p. 505.

Again in the *Groseclose* case at p. 506 the Court said:

> "We believe that the Secretary's definition of "against equity and good conscience" is unreasonably narrow. It cannot be said that the relinquishment of a valuable right and the changing of one's position for the worse represent the only circumstance in which recoupment would be inequitable. We find it difficult to imagine a more unfair and unjust situation than requiring a person who is without fault to repay overpaid benefits when that person had no knowledge of the overpayments. . . . Moreover, recoupment in this case would be inconsistent with the policy expressed in the legislative history – that recoupment should be equitable."

The Order by Mr. Bower and Mr. Kever failed to provide any evidence. It ignored its own Board rules. The Board instead talked about 20 C.F.R. Sec. 255.12 which Mrs. Oye submits does not even apply in this case. The refusal and omission to follow its own Board Rules is " . . . inconsistent with reasoned decisionmaking." *Reed v. Railroad Retirement Board,* 107 F.3d 923 (1997).

Mr. V.M. Speakman, Jr. stated in his March 25, 1997 unchallenged dissenting opinion:

> "In January, 1982, the Board unanimously adopted a policy of applying waiver to overpayments caused by administrative error that the annuitant could not be expected to be aware of and which had gone undetected for four years or longer. The policy was applied until October, 1996." (App. 11)

On its face the evidence shows that the starting date was March 13, 1990. Four (4) years and five (5) months later, August 26, 1994, the notice of overpayment was sent to Mrs. Oye.

As Mr. Speakman, reviewing the evidence stated:

> "There is no dispute that Mrs. Oye was without fault in causing the overpayment. The overpayment went on for a period in excess of four years." (App. 12)

Mr. Bower and Mr. Kever Arbitrarily refused to follow its own January, 1982 Board policy. They offer no evidence or any explanation whatsoever of why they refused to grant Mrs. Oye a waiver from her overpayments caused by administrative error.

Thus, the arbitrary refusal by the RRB majority to grant Mrs. Oye waiver of overpayments has deprived Mrs. Oye of due process rights under Amendment V and "equity and good conscience" under 45 U.S.C. Sec. 231i(c).

II.

Congress, under 45 U.S.C. Sec. 231f(b)(3), allowed the RRB to delegate its authority under the following conditions:

> " . . . The Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this subchapter, excluding only the power to prescribe rules and regulations, including the power to make decisions on applications for annuities or other benefits." p. 429

Along with delegating authority, Congress, under 45 U.S.C. Sec. 231f(b)(6), conferred the following powers to the Board:

> "(6) The Board shall gather, keep, compile and publish a convenient form such records and data as may be necessary to assure proper administration of this subchapter. . . . The Board shall have the power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this subchapter . . . The several district courts of the United States shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issues pursuant to this section."

Internal Revenue Code, Railroad Retirement Tax Act (26 U.S.C. 3201 et seq.) is not simply a revenue act. It is a companion act to the Railroad Retirement Act. *Allen v. Ocean S.S. Co of Savannah,* 123 F.2d 469, 1941. Congress created the two acts to regulate *State of California v. Anglim,* 129 F.2d 455, cert. denied, 63 S.Ct. 74, 317 U.S. 669, 87 L.Ed. 537 (1942)

Black's Law Dictionary, 7th Ed. p. 670 defines fraud as:

> "1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment . . . 1. A misrepresentation made recklessly without belief in its truth to induce another person to act."

Within this section below appear (1) fraudulent concealment of records; (2) fraudulent back dating; and (3) fraudulent misrepresentation of payments made that were never made.

Before his hearing Mr. Rivera had available to him (1) U.S. Treasury direct deposit banking information, and (2) RRB Tax information records. At Mr. Rivera's, April 16, 1996 hearing, Mr. Abrahamsen, putting Mr. Rivera on notice of the availability of such information, stated for the record:

> P.4, L1 " . . . We intend to submit some records which will probably consist (L2) of bank records, to show that the overpayment should be a lesser amount than – than what (L3) your figures are showing."

Mr. Abrahamsen subsequently submitted Mrs. Oye's copies of Mrs. Oye's direct deposit bank records along with Mrs. Oye's RRB W-2 Tax Statements. (App. 6-10) On August 22, 1996 Mr. Rivera reported his calculations with his findings.

Thus before this Court is the following: (App. 6-10, 14)

Year	U.S. Treasury Mrs. Oye's Actual Direct Deposit Bank Records show	RRB Actual Tax Records show	Mr. Rivera's Hearing and Board Approved Calculations show
1990	$ 5,184.60	$ 5,484.60	$ 6,037.15
1991	6,622.42	6,630.96	6,633.98
1992	7,493.96	7,793.96	7,922.30
1993	8,204.04	8,204.04	8,216.93
Total	$27,505.02	$28,112.81	$28,809.76

On its face, Mr. Rivera knowingly concealed the (1) U.S. Treasury direct deposit records, (2) RRB W-2 Tax Statements. (App. 6-10) He knowingly misrepresented the

truth that his calculations were correct and the only accurate records available. Mr. Rivera induced the RRB Board and the U.S. Court of Appeals to act approving his records falsely entering opinions approving his fraudulent records. Why? Simply, Mr. Rivera knew or should have known that the RRB figures did not match the RRB Tax records and the U.S. Treasury records.

How did Mrs. Oye fill out her federal and state income tax returns for the years 1990 through 1999? She used the RRB TAX Statements annually sent to her. (App. 6-10)

Now, how can Mrs. Oye accurately fill out her federal and state income tax returns, "under penalty of perjury." Which set of government records is she supposed to use to complete her federal and state income tax returns: (1) U.S. Treasury direct deposits; (2) RRB TAX Statements; or (3) Mr. Rivera's calculations approved by the RRB on March 25, 1997. (App. 6-10, 14)

Under 45 U.S.C. Sec. 231 d, Annuity beginning and ending dates provides the beginning date " . . . (1) not earlier than the date specified in the application; . . . " RRB SPOUSE ANNUITY BOOKLET, RB 30-9-89, Part I, Chapter 1, Section B, Age Requirement, page 2, 1.(a) states " . . . You must be 60 for a full month." Mrs. Oye celebrated her 60th birthday on January 11, 1990. A full month later, February 11, 1990 she became eligible for RRB spouse benefits. The application was filed March 13, 1990. Mr. Rivera fraudulently back dated his calculations from "02-01-90" in violation of 45 U.S.C. 231 d and RRB SPOUSE ANNUITY BOOK. Clearly, Mrs. Oye was not eligible for benefits "02-01-90."

Mr. Rivera fraudulently represented that Mrs. Oye received $548.46 on February 1, 1990. Yet, he failed to show any U.S. Treasury records that she received the amount. (App. 14)

III.

On January 1, 1996 Mrs. Oye began receiving social security based on her earnings as a nurse. (App. 15) During 1996, the RRB withheld $2919.44 without a prerecoupment hearing in the following amounts: January ($277.36); February ($277.36); March ($128.36); April ($128.36); and April 22, ($2108.00).

Withholding social security payments by the RRB without a prerecoupment hearing violated the due process clause of the Fifth Amendment. See *Califano v. Yamasaki,* 442 U.S. 682, 61 L.Ed.2d 176, 99 S.Ct. 2545 (1979).

IV.

From 1990 through 1993 Mrs. Oye declared $26,000 as her income. Each year, 1990 through 1993, Mrs. Oye received an RRB Tax Statement.

Mrs. Oye's bank records show an overpayment balance of $3757.26. RRB Tax Statements show an overpayment balance of $4365.80. Rivera shows an overpayment balance of $5062.00. The balance errors violate Mrs. Oye's due process rights.

RRB will continue to withhold $90.00 per month for the next 14 months or $1260.00. The RRB intends to collect $11,107.68, $4910.80 above the original $6196.88. Thus the RRB has been and continues to be unjustly enriched taking Mrs. Oye's private property for public use without just compensation.

CONCLUSION

Finally, before this Court are RRB Tax Statements and Rivera's computations for your calculation.

Petitioner prays that this Court finds: (1) waiver be granted; (2) U.S. Treasury and RRB Tax statements are concealed; (3) Social Security payments are withheld without a prerecoupment hearing; (4) Overpayments are inconsistent; (5) RRB is unjustly enriched $3650.80.

For all of the above reasons, Petitioner urges this Court to grant the Petition for Certiorari prayed for and remand this case to the United States District Court and for such other orders in equity as this Court in review may enter.

Respectfully submitted,

Larry A. Duff, Ne: #11094
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Jeanette E. Oye, Petitioner	*	
v.	*	Petition for Review of an Order of the Railroad Retirement Board
Railroad Retirement Board, Respondent.	*	(UNPUBLISHED)

Submitted: January 6, 2000

Filed: January 13, 2000

Before McMILLIAN, RICHARD S. ARNOLD, and MORRIS SHEPPARD ARNOLD, Circuit Judges

---

PER CURIAM

Jeanette E. Oye appeals from the final order of the Railroad Retirement Board (RRB) denying a waiver of recovery of overpaid benefits. For reversal appellant argues that the RRB failed to follow its internal policy regarding waiving recovery of overpayments and defined "against equity and good conscience" too narrowly; she also challenges the accuracy of the RRB's calculations.

Our review of an RRB decision is limited to determining whether it is supported by substantial evidence, not arbitrary, and reasonably based in the law; the RRB's findings of fact, if supported by the evidence and in the absence of fraud, are conclusive. See 45 U.S.C. Sec 355(f); King v. Railroad Retirement Bd. 981 F.2d 365, 367 (8th Cir.

1992) (per curiam). We conclude the evidence does not support Oye's contention that she relinquished a valuable right and that recovery of the overpayment would thus be "against equity and good conscience." See Groseclose v. Bowen, 809 F.2d 502, 506 (8th Cir. 1987) (recovery of social security benefits is "against equity and good conscience" if, inter alia, beneficiary relinquishes a valuable right); 20 C.F.R. Sec. 255.12(c) (1997) (beneficiary has no entitlement to waiver of recovery of overpaid RRB benefits; factors considered in determining whether waiver should be granted include whether individual knew or should have known amount was incorrect and failed to inquire or advise RRb of incorrectness or amount).

We further conclude that the RRB's explanation as to why its waiver policy was not applicable to Oye is "adequate to satisfy the requirement of reasoned decisionmaking," See Reed v. Railroad Retirement Bd. 145 F.3d 373, 375 (C.D.Cir, 1998) (court satisfied with RRB's explanation of what appeared to be inconsistent rulings).

Finally, we conclude the RRB's calculations were supported by evidence in the record and Oye submitted no evidence of fraud. We also deny any further postponement in rendering our decision, because Oye's request for a temporary postponement was based upon the RRB's allegedly incorrect calculations.

Accordingly, we affirm

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 98-1786

Jeanette E. Oye	*	
Petitioner,	*	
vs.	*	Petition for Review
Railroad Retirement Board,	*	
Respondent.	*	

The petition for rehearing filed by the petitioner has been considered by the court and is denied. (5193-010199)

February 17, 2000

Ordered Entered at the Direction of the Court:

Signed: Michael E. Gans, Clerk U.S. Court of Appeals, Eighth Circuit

RECEIPT FOR YOUR CLAIM

3-13-90

EMPLOYEE'S NAME:

APPLICANT'S NAME JEANETTE E. OYE

RAILROAD RETIREMENT BOARD CLAIM NUMBER
MA-326-26-3038

DATE CLAIM RECEIVED
03 13 90

* * *

➨EARNINGS – If your earnings change.

On your application you told us:

- You expect total earnings for 1990 to be $26,000
- You (are) (are not) earning wages of more than $540 a month.
- You (are) (are not) self-employed rendering substantial services in your trade or business.

* * *

DIRECT DEPOSIT SIGN-UP FORM

* * *

SECTION 1 *(TO BE COMPLETED BY PAYEE)*

A NAME OF PAYEE (*last, first, middle initial*)
Jeanette E. Oye

ADDRESS (*street, route, P.O. Box, APO/FPO*)
1727 N 58 Street

CITY STATE ZIP CODE
Omaha Ne 68104

TELEPHONE NUMBER AREA CODE 402-551-7639

B NAME OF PERSON(S) ENTITLED TO PAYMENT
Jeanette E. Oye

C CLAIM OR PAYROLL ID NUMBER
1116 326 26 3038
Prefix Suffix

JOINT ACCOUNT HOLDERS' CERTIFICATION (*optional*)

I certify that I have read and understood the back of this form including the SPECIAL NOTICE TO JOINT ACCOUNT HOLDERS.

SIGNATURE DATE
/S/ Jeanette E. Oye 4-7-90

SIGNATURE DATE
/s/ Raymond R. Oye 4-7-90

* * *

1990

1. Claim No. and Payee Code
   MA326-26-3038 2

2. Recipient's Identification Number
   507-34-2223

   Recipient's Name, Street Address, City, State, and Zip Code
   01910MA326263038
   JEANETTE E OYE
   533 N 72ND AVE
   OMAHA NE 68114

3. Total Contributions Recovered thru 1990

4. Employee Contributions

5. Contributions Recovered

[X] Yes [ ] No
[X] 3-Yr. Rule [ ] Gen. Rule

6. Rate of Tax

7. Federal Tax Withheld
   15.00

8. Country

9. Taxable Contributory Amount
   5,484.60

10. Taxable Vested Dual Ben.

11. Taxable Supplemental Ann.

12. Total Gross Taxable
    5,484.60

13. Total Repaid
    -0-

14. Contributory Amount Paid

15. No. of Monthly Payments

1991

1. Claim No. and Payee Code
MA326-26-3038 2

2. Recipient's identification Number
507-34-2223

Recipient's Name, Street Address, City, State, and Zip Code
01920MA3262630382
JEANETTE E OYE
533 N 72ND AVE
OMAHA NE 68114

3. Total Contributions Recovered thru 1991

4. Employee Contributions

5. Contributions Recovered

[X] Yes [ ] No
[X] 3-Yr. Rule [ ] Gen. Rule

6. Rate of Tax

7. Federal Tax Withheld
38.00

8. Country

9. Taxable Contributory Amount
6,630.60

10. Taxable Vested Dual Ben.

11. Taxable Supplemental Ann.

12. Total Gross Taxable
6,630.60

13. Total Repaid
-0-

14. Contributory Amount Paid

15. No. of Monthly Payments

1992

1. Claim No. and Payee Code
MA326-26-3038 2

2. Recipient's Identification Number
507-34-2223

Recipient's Name, Street Address, City, State, and Zip Code
01930MA3262630382
JEANETTE E OYE
533 N 72ND AVE
OMAHA NE 68114-3203

3. Gross Social Security Equivalent Benefit Portion of Tier 1 Paid in 1992
3,828.76

4. Social Security Equivalent Benefit Portion of Tier 1 Repaid to RRB in 1992
-0-

5. Net Social Security Equivalent Benefit Portion of Tier 1 Paid in 1992
3,828.76

6. Workers' Compensation Offset in 1992

7. Social Security Equivalent Benefit Portion of Tier 1 Paid for 1991

8. Social Security Equivalent Benefit Portion of Tier 1 Paid for 1990

9. Social Security Equivalent Benefit Portion of Tier 1 Paid for Years Prior to 1990

10. Federal Income Tax Withheld
-0-

* * *

1992

1. Claim No. and Payee Code
MA326-26-3038 2

2. Recipient's Identification Number
507-34-2223

Recipient's Name, Street Address, City, State, and Zip Code
01930MA3262630382
JEANETTE E OYE
533 N 72ND AVE
OMAHA NE 68114-3203

3. Employee Contributions

4. Contributory Amount Paid
3,965.20

5. Vested Dual Benefit

6. Supplemental Annuity

7. Total Gross Paid
3,965.20

8. Prior Year Repayments
-0-

9. Federal Income Tax Withheld
74.00

1993

1. Claim No. and Payee Code
MA326-26-3038 2

2. Recipient's identification Number
507-34-2223

Recipient's Name, Street Address, City, State, and Zip Code
01940MA3262630382
JEANETTE E OYE
533 N 72ND AVE
OMAHA NE 68114-3203

3. Gross Social Security Equivalent Benefit Portion of Tier 1 Paid in 1993 4,620.00

4. Social Security Equivalent Benefit Portion of Tier 1 Repaid to RRB in 1993
-0-

5. Net Social Security Equivalent Benefit Portion of Tier 1 Paid in 1993
4,620.00

* * *

1993

1. Claim No. and Payee Code
MA326-26-3038 2

2. Recipient's identification Number
507-34-2223

Recipient's Name, Street Address, City, State, and Zip Code
01940MA3262630382
JEANETTE E OYE
533 N 72ND AVE
OMAHA NE 68114-3203

3. Employee Contributions

4. Contributory Amount Paid
3,584.04

5. Vested Dual Benefit

6. Supplemental Annuity

7. Total Gross Paid
   3,584.04

8. Prior Year Repayments
   -0-

DISSENT OF V. M. SPEAKMAN, JR.

Appeal of Jeanette E. Oye R.R.B. No. MA-326-26-3038	)	Claims Appeal Docket No. 96-AP-0023

I have reviewed the record in the above captioned appeal and I must dissent from the decision of the majority. There are two bases for my dissent.

In January 1982, the Board unanimously adopted a policy of applying waiver to overpayments caused by administrative error that the annuitant could not be expected to be aware of, and which had gone undetected for four years or longer. This policy was applied until October 1996.

Ms. Oye was overpaid $6,196.88 during the period February 1, 1990 through December 31, 1994. The overpayment was reduced to $4,292.88 by accruals through January 1996. The overpayment was caused by the agency's failure to reduce Ms. Oye's annuity for earnings in excess of the exempt amount, even though Ms. Oye informed the Board of the amount of her earnings when she filed for

benefits. There is no dispute that Ms. Oye was without fault in causing the overpayment. The overpayment went on for a period in excess of four years. The original overpayment letter was sent to Ms. Oye on August 26, 1994. *See* exhibit 14 of the hearings officer's decision. The Board's subordinate unit should have applied the above policy and waived recovery of the overpayment.

The Board's failure to follow its long standing policies was recently classified as "inconsistent with reasoned decision making" by the United States Court of Appeals for the District of Columbia Circuit. *See Reed v. Railroad Retirement Board,* No. 96-1117, slip op. at 1 (D.C. Cir. January 27, 1997). The majority of the Board's failure to follow its long standing policy without any explanation in this case is also inconsistent with reasoned decision making.

Even if we were not to follow the policy described above, it is my opinion that recovery of her overpayment should be waived. It is undisputed that Ms. Oye is without fault in causing the overpayment to occur. Turning to the second prong of the waiver determination, whether recovery of the overpayment would be either against the purposes of the Act or be against equity or good conscience, I conclude that recovery would be against equity or good conscience. In making this determination, the term "equity or good conscience" should not be given a narrow definition. *See Quinlivan v. Sullivan,* 916 F.2d 524 (9th Cir. 1990) and *Groseclose v. Bowen,* 809 F.2d 501 (8th Cir. 1987). In my judgment, it is against equity or good conscience to initiate recovery in 1996 of a debt which began in 1990. This is grossly unfair and inequitable, especially

when dealing with older and retired individuals. In addition, if the Board had not failed in its obligation to timely notify beneficiaries like Ms. Oye of an overpayment in 1990, there might never have been any overpayment in subsequent years. As a result of the Board's failure to promptly notify her of the 1990 overpayment, Ms. Oye was misled into believing that there was no problem with her earnings. Finally, I find it credible that Ms. Oye believed that she could earn up to $26,000 per year. She had informed the Board of her earnings of this amount in 1990 and no overpayment was called to her attention.

In conclusion, I find that Ms. Oye meets the conditions set forth in section 10(c) of the Act; therefore, recovery of the overpayment must be waived.

/s/ V. M. Speakman, Jr.
V. M. Speakman, Jr.
MAR 25 1997

FROM	THROUGH	ANNUITY RATE DUE	ANNUITY RATE PAID	ANNUITY RATE CHANGE	TIMES NO. OF MONTHS	UNDER/ OVERPAYMENT
02-01-90	11-30-90	$451.46	$548.46	$ 97.00-	X 10	$ 970.00-
12-01-90	11-30-91	455.55	552.55	97.00-	X 12	1164.00-
12-01-91	01-31-92	458.33	555.33	97.00-	X 02	194.00-
02-01-91	09-30-92	534.33	668.33	134.00-	X 08	1072.00-
10-01-92	10-31-92	666.33	668.33	2.00-	X 01	2.00-
11-01-92	11-30-92	668.33	668.33	0.00-	X 01	0.00-
12-01-92	12-31-92	683.67	683.67	0.00-	X 01	0.00-
01-01-93	11-30-93	545.67	683.67	138.00-	X 11	1518.00-
12-01-93	12-31-93	554.56	696.56	142.00-	X 01	142.00-
01-01-94	08-31-94	554.57	696.56	141.99-	X 08	1135.92-
09-01-94	11-30-94	554.57	554.56	0.01-	X 03	.03+
12-01-94	12-31-94	565.72	564.71	1.01-	X 01	1.01+
Rivera Calculations			TOTAL OVERPAYMENT ACCRUAL PREVIOUSLY WITHHELD NET OVERPAYMENT			$6,196.88 -1,904.00 4,292.88

MCS 3.5 EARNINGS COMP DETERMINATION
NH SSN: 507342223 NH NAME: JEANETTE E OYE

* * *

CASE DISPLAY

PIA: 832.90 FAMILY MAX: 1541.10 COMPUTATION
PIA REDUCED FOR AGE: TYPE: NS 78
DATE LAST INSURED: LOW TWO
YEARS: 1951 7349.16 IND
1960 9173.48 IND

CLAIM
DISPLAY BIC CL NAME
A JEANETT OYE

CLAIM TYPE	ENTITLED DATE	LAF	NEXT PAYMENT AMT – DATE	ONGOING PAYMENT
RIB	Y 08/95	C	4930.00 02/96	854.00

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